

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
JAMES MICHAEL SNOWDEN,
Respondent.

CASE NO. 65,176

FILED
SID J. WHITE
AUG 16 1984
CLERK, SUPREME COURT
By [Signature]
Chief Deputy Clerk

PETITIONER'S REPLY BRIEF ON MERITS

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| POINT | |
| THE DISTRICT COURT ERRED IN VA- CATING THE RESPONDENT'S CONVICTION FOR GRAND THEFT. | 1-3 |
| CONCLUSION | 4 |
| CERTIFICATE OF SERVICE | 4 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|--|-------------|
| <u>Albernaz v. United States,</u> 450 U.S. 333 (1981) | 1, 3 |
| <u>Blockburger v. United States,</u> 284 U.S. 299 (1932) | 2 |
| <u>Borges v. State,</u> 415 So.2d 1265 (Fla. 1982) | 1 |
| <u>Brown v. State,</u> 206 So.2d 377 (Fla. 1968) | 3 |
| <u>State v. Brown,</u> ___ So.2d ___ (Fla. 1984) [9 FLW 292] | 2 |
| <u>State v. Marshall,</u> ___ So.2d ___ (Fla. 1984) [9 FLW 291] | 2 |

POINT

THE DISTRICT COURT ERRED IN VAC-
ATING THE RESPONDENT'S CONVICTION
FOR GRAND THEFT.

It would appear from the Respondent's argument that a distinction must be made between "lesser included offenses" and "underlying felonies." While the two entities are similar to the extent that they may (or must) be proved in the course of proving some other offense (i.e. either the greater degree of the crime or some other superior offense). Aside from this similarity, which is more a similarity of use rather than form, the two entities are not alike.

A "lesser included" offense is a different degree of the same crime, i.e. third degree murder is a lesser degree of first degree murder or second degree. It differs from its superior degrees only in that the greater degree is identical, but also includes one additional element. Borges v. State, 415 So.2d 1265 (Fla. 1982).

An "underlying felony" is a separate and distinct crime which is committed during the commission of some other crime of a different genre, such as murder and grand theft. As noted before, proving a theft can never prove a degree of homicide, and merely proving that someone died cannot prove something was stolen. Thus, the two offenses are unique. Albernaz v. United State, 450

U.S. 333 (1981); see e.g. State v. Marshall, ___ So.2d ___ (Fla. 1984) [9 FLW 291]; State v. Brown, ___ So.2d ___ (Fla. 1984) [9 FLW 292].

Thus, while a lesser included offense is "automatically" proved by proof of the greater crime, an "underlying felony" such as theft is not "automatically" proved by proof of a homicide.

The Respondent ably contends that since our crime is "felony murder", this particular form of murder carries with it the element of an underlying felony. That is correct, but that underlying felony is not a "lesser included offense." It is a separate crime.

We must remember that the ultimate crime, first degree murder, requires an intent to take the life of another. "Lack of intent" thus surfaced as a defense; and "intent" being incapable of direct proof (absent a confession) the need arose to protect society from incidental homicides. Out of this arose the felony murder concept (i.e. if one commits a crime and an unintended killing results, said killing is treated as though intentional). The creation of this legal fiction, however, was for the purpose of punishing the killing, not for preventing prosecution for that underlying felony.

Thus, as noted in Blockburger v. United States, 284 U.S. 299 (1932), where two legislatively defined

crimes result from a single incident, both may be punished as long as each bears a unique element. Pursuant to Albernaz v. United States, 450 U.S. 333 (1981), statutory elements rather than particular evidence forms the basis of the examination.

Again, to categorize an underlying felony as a lesser offense is nothing more than a revival of the old "category 4" lesser offense announced in Brown v. State, 206 So.2d 377 (Fla. 1968).

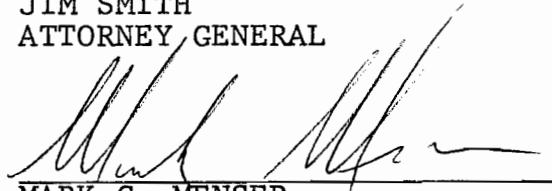
It is suggested that the "crime" of felony murder is "murder," not robbery. While the proof of an underlying offense is an evidentiary predicate, it is not the exclusive evidence of murder. A killing of a human being by the defendant still needs to be established. Proof of the theft does not prove murder, and proof of the killing does not prove theft. That is why grand theft was (and is) an underlying felony, not a lesser included offense; that is why both crimes may be punished without offending the constitution; and that is why it is so important for this Honorable Court to clarify the distinction between lesser offenses and underlying offenses.

CONCLUSION

The District Court's equation of lesser offenses and underlying felonies was erroneous insofar as it ignored the differences between these entities, and to the extent that it lead to a conclusion that the double jeopardy clause precludes separate convictions and sentences for underlying offenses.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

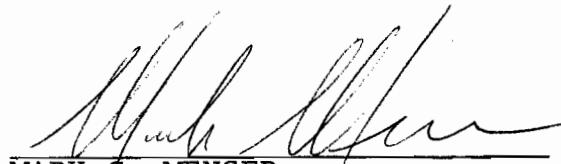


MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Reply Brief on Merits has been furnished, by delivery, to James R. Wulchak, Assistant Public Defender, for Respondent this 15th day of August, 1984.



MARK C. MENSER
Of Counsel for Petitioner